

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74
~~73~~-1262

To be argued by
NICHOLAS FIGUEROA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1262

UNITED STATES OF AMERICA,

Appellee,

—v.—

THEODORE FRATTINI and STEVEN CARDILE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York
Attorney for the United States
of America.*

NICHOLAS FIGUEROA,
S. ANDREW SCHAFER,
*Assistant United States Attorneys
Of Counsel.*



TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
Theodore Frattini's Case	6
Steven Cardile's Case	7
The Government's Rebuttal Case	8
ARGUMENT:	
POINT I—Cardile's motion for a continuance was properly denied by the District Court	9
POINT II—Cardile's incriminating statements to Parton after their arraignment were properly admitted into evidence	10
POINT III—The Court did not improperly limit the receipt of defense testimony	11
POINT IV—Government's Exhibit 9 had been received in evidence and was properly examined by the jury during deliberations	12
POINT V—In the absence of a defense request, there was no error in the Court's failure to hold a hearing into the ability of Juror No. 6 to understand English	13
CONCLUSION	14

TABLE OF CASES

	PAGE
<i>Massiah v. United States</i> , 377 U.S. 201 (1964)	10
<i>Unger v. Sarafite</i> , 376 U.S. 575 (1963)	9
<i>United States v. Dioguardi</i> , 492 F.2d 70 (2d Cir. 1974)	14
<i>United States v. Gaynor</i> , 472 F.2d 899 (2d Cir. 1973)	10
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966)	12
<i>United States v. Purin</i> , 486 F.2d 1363 (2d Cir. 1973)....	10
<i>United States v. Wyler</i> , 487 F.2d 170 (2d Cir. 1973)....	9

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 73-1262

UNITED STATES OF AMERICA,

Appellee,

—v.—

THEODORE FRATTINI and STEVEN CARDILE,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Theodore Frattini and Steven Cardile appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on February 14, 1974, following a four-day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 73 Cr. 1062, in two counts, was filed November 23, 1973, and charged the appellants and another, Floyd M. Parton,* with distribution and possession with intent to distribute, 56.35 grams of cocaine and with conspiracy so to do, in violation of Title 21, United States Code, Sections 812, 841 and 846.

* Floyd M. Parton pleaded guilty on December 7, 1973, to Count 1 charging him with conspiracy and was subsequently sentenced to a two year term of probation.

Trial of the appellants commenced on January 4, 1974, before Judge Carter and a jury. On January 9, 1974, the jury found the appellants guilty on both counts.

On February 14, 1974, Judge Carter sentenced each of the appellants to a three year term of imprisonment on Count 1 execution of which was suspended except for six months, and three years probation on Count 2. Appellants are presently free on bail pending the outcome of this appeal.

Statement of Facts

The Government's Case

While posing as a purchaser of narcotics, Special Agent Douglas Driver of the Drug Enforcement Administration met Floyd Parton during August, 1972, and bought a small amount of methadone and methamphetamine from him. After his purchase, Driver informed Parton that he was interested in making additional purchases of various kinds of drugs. Suggesting that they exchange phone numbers Driver asked whether there would be more drugs available for sale in the near future. Parton replied that he would let him know after first contacting "his people." During the following weeks they traded phone calls and made several unsuccessful attempts to meet for the purpose of discussing other drug transactions (Tr. 25-29, 129-130).*

Finally, around October 13, 1972, Parton received a phone call from Steve Cardile from whom he had previously purchased drugs. Cardile informed him that he had "some dynamite coke" available for sale. Thinking of Driver as a prospective customer, Parton asked Cardile to bring a sample of the cocaine to Tony Magner's, 1081 Yonkers Avenue, Yonkers, New York, where Parton worked as a hair stylist. The next morning Cardile visited Tony Mag-

* "Tr." refers to the stenographic transcript of the trial which is part of the record on appeal; GX refers to Government's exhibit received in evidence.

ner's and after a quick exchange of greetings, was escorted by Parton to a room in the rear of the store. After Parton closed the door behind them, Cardile produced and began to unfold a tin-foil package containing a white powder into which Parton thrust his finger. Raising his finger to his mouth he rubbed a speck of the powder on his tongue. Rapidly feeling a numbing sensation on his tongue, Parton judged the powder to consist of high quality cocaine and declared the results of his test to be "fantastic". In response to his question concerning the price, Cardile stated he had four ounces available at \$1000 per ounce. Parton said he would notify his prospective customer, and would inform Cardile of the result (Tr. 131-134).

After receiving Parton's phone call concerning the availability of the cocaine, Driver complained that the price of \$1000 per ounce was too expensive. Promising that he would look into the matter, Parton then phoned Cardile and after a brief negotiation, a price of \$900 was agreed upon for each of two ounces which Cardile now had remaining. In spite of this price reduction Parton was again met by Driver's insistence that the price was still too high and that he would pay no more than \$850 per ounce. Continuing to act as a middle-man, Parton reported this counter-offer to Cardile who nevertheless refused to accept less than \$900 per ounce. Notwithstanding Cardile's refusal and rather than risk losing the deal, Parton took it upon himself to go forward with the transaction. Accordingly, on October 17, 1972, he instructed Agent Driver to meet him at 7:00 P.M. at the Cross County Diner located on Yonkers Avenue directly opposite Tony Magner's (Tr. 30-34, 131-135).

That evening, after parking his car, Driver was greeted by Parton in the parking lot of the diner. They then entered the diner and sat at a booth facing Yonkers Avenue. Despite Parton's enthusiastic salesmanship, Driver persisted in paying only \$850 per ounce instead of the \$900 urged

by Parton. Finally surrendering to Driver's immovability, Parton offered to "contact his people" to test their reaction to the lower price. Accompanied by Driver, he went to a phone booth and dialed Cardile's residence, and asked Cardile's wife, Lucy, for "Steve or Teddy." Parton haggled briefly, first with Cardile, and then with Frattini, about the possibility of selling the two ounces at \$850 per ounce. Without further explanation he replaced the receiver and announced that within a few minutes his people would be arriving in a black Cadillac El Dorado.* A few minutes after returning to their booth they observed a yellow Chrysler driven by Frattini come to a stop across Yonker's Avenue opposite the diner. Immediately Parton stood up, motioned towards Frattini and said, "There is one of my boys." Excusing himself he left the diner, entered the Chrysler and sat down alongside Frattini (Tr. 34-37, 136-138). Parton asked Frattini to "front" the cocaine to him so that he could take it to Driver inside the diner and return with the money. Frattini rejected this suggestion by recommending that Parton make another attempt to obtain the money. Parton, momentarily stymied, inquired concerning the whereabouts of Cardile. Frattini responded by pointing his finger across Yonkers Avenue in the direction of the diner's parking lot (Tr. 34-37, 136-139).

Parton left the car, returned to the diner, and renewed his plea to Driver to be entrusted with the \$1700. Driver refused and Parton left the diner on another attempt to have the cocaine advanced. Approaching the Chrysler which had now been driven into the diner parking lot, he noticed a red Duster a few feet away in which he recognized Cardile. Going to the Chrysler first, he told Frattini of Driver's unwillingness to advance the \$1700. At last resigned to the idea of having to advance the cocaine,

* During his cross-examination, Cardile admitted owning a black Cadillac El Dorado (Tr. 376).

Frattini replied, "Okay get it from Steve" (Tr. 37-38, 139-140). Parton walked over to Cardile who reached down below his seat and came up with a brown paper bag which he handed to Parton. Stuffing the bag in the front waistband of his trousers, Parton then pulled his sweat shirt over it and started towards the diner (Tr. 140-141).

Rejoining Driver in the booth he sat down opposite him and removed the brown paper bag from his waistband. He extracted a package and handed it under the table to Driver who proceeded to the men's room, where a field test showed the presence of cocaine. Driver returned to the booth and handed \$1700 to Parton who then gave him a second tin-foil package (GX 17A, 17B; Tr. 39-40). After Parton counted the money, he left the diner and returned to the Chrysler. He handed the \$1700 to Frattini who counted it and informed him that Cardile was "a little burned up" because he had expected the price to have been maintained at \$1800. Frattini suggested that Parton phone Cardile because Cardile was now claiming that either Parton or his customer owed him a hundred dollars (Tr. 143). After arguing that he hadn't made a penny on the deal, Parton headed back toward the diner and saw Cardile start his car and drive off (Tr. 141-144).

After receiving the \$1700 Frattini circled the block and then proceeded towards Cardile's residence some six blocks away. Spotting Cardile standing near the open door of his Duster, he approached. They each took seats inside the Duster where Frattini handed Cardile part of the \$1700. Fifteen minutes later Frattini was driven out of the area by an unidentified female. After stopping off at a boutique and a restaurant, they were followed to an area of the Bronx where Frattini resided (Tr. 213-215, 235-237). The following day Cardile phoned Parton at work and told him "Your boy owes me a hundred dollars. I had to lay out a lot of bread for that." Parton promised him that he would try to make it up on the next deal (Tr. 145).

Theodore Frattini's Case

Frattini argued that his presence in the vicinity of the Cross County Diner during the cocaine transaction was merely fortuitous. He claimed that he had parked on Yonkers Avenue to await the planned arrival of his part-time employer, Michael DeMartino, who was going to offer him full time employment. He called DeMartino as a witness to corroborate his claim of their having had an appointment (Tr. 272, 309-311).

Frattini asserted that while he was waiting for DeMartino, Parton came over, got into the Chrysler, and engaged in a friendly chat in which he told Frattini that he was there to meet Cardile about a debt. Frattini testified that shortly after this conversation he pulled into the parking lot of the diner and saw Cardile in a car, accompanied by his wife and a friend, heatedly arguing with Parton over the latter's failure to pay a debt. Before driving off, Cardile allegedly requested Frattini to deliver the debt money to Cardile's house should Parton come up with it. Frattini testified that a little while later, while he was still waiting for DeMartino in the parking lot, Parton came, entered his Chrysler a second time and gave him the money he owed Cardile. He claimed that after he put the money into his pocket he left the parking lot and returned to the front of the diner where he continued waiting for DeMartino (Tr. 272-275).

He explained that it was quite possible that he had circled the block where he had been parked because he frequently did this as a means of seeing whether his mother, who lived around the corner, was home. He further explained that when informed by a waitress from the diner that DeMartino could not keep his appointment, he went to the Cardile residence to drop off Parton's payment and to meet his wife who was expecting him there. He testified that when he finally arrived in the vicinity of the

Cardile residence he saw Cardile getting out of his car and went over to him to deliver the money from Parton (Tr. 276-281).

In support of his testimony he called as a witness his wife, Maria Frattini. Mrs. Frattini testified that she and her husband had agreed to meet at the Cardile residence on the evening of October 17, 1972, and while awaiting his arrival, she observed Steve Cardile arrive in his car followed shortly thereafter by her husband's car. She testified that she saw her husband go over to Cardile and hand him some money (Tr. 333-336). On cross-examination she was unable to recall whether Cardile had arrived unaccompanied or who else was present (Tr. 337-340).

Steven Cardile's Case

Cardile, testifying in his own behalf, advanced a similar defense. He testified that on the morning of the alleged sale he had impatiently phoned Parton to demand payment of a \$25 balance on a \$200 loan which he had made to Parton some nine months earlier. Consequently, he testified, when Parton failed to make payment after troubling him to come to the diner for that purpose, he angrily drove back home, but not before asking Frattini to deliver any possible payment Parton might thereafter be able to make (Tr. 355-361). He testified that shortly after his departure Frattini delivered \$15 from Parton, which he entered on a slip of paper on which he had previously reflected the dates and amounts of Parton's prior eleven payments on his \$200 debt (Defense Exhibit "A").

In support of his testimony, Cardile called his wife Lucy Cardile to the stand. She testified that in response to Parton's phone call, she and Louis Mancuso, a friend who happened to be visiting, casually accompanied her husband on his trip to the diner. She and Mancuso both testified consistently with Steve Cardile's version concern-

ing the innocuous nature of his meeting with Parton (Tr. 458-462).

Cardile's trial counsel, Alfred M. Christiansen, testified on behalf of his client concerning statements made by Parton shortly after his arraignment in which he allegedly absolved Cardile of any blame relative to the drug transaction (Tr. 466-471).

The Government's Rebuttal Case

Detective John McCabe, Yonkers Police Department, on being recalled to the stand testified that contrary to appellant Frattini's testimony, he had not observed a waitress or any other employee of the diner approach Frattini's car outside the diner (Tr. 474-475).

Floyd Parton testified that contrary to Steven Cardile's testimony, Parton had never stated to Cardile that he, Parton, was the only one responsible for the cocaine sale to Agent Driver (Tr. 479-484).

Michelle Herman, a lawyer from the Legal Aid Society, testified that she had been assigned to represent Floyd Parton in the instant case and that shortly after her client's arraignment she, contrary to prior defense testimony, had observed Cardile and her client speaking privately on several occasions (Tr. 488).

ARGUMENT

POINT I

Cardile's motion for a continuance was properly denied by the District Court.

Cardile asserts that the Trial Court's refusal to grant a one day continuance to permit him to secure the attendance of an out of state witness was so arbitrary and improper that it amounted to an abuse of discretion. In support of this position Cardile now claims that the testimony of his prospective witness was of great importance because it dealt with Parton's motivation in testifying as a government witness. His contention is without merit.

At the time of his motion the only reason advanced in support of the continuance was the bare claim that the testimony was material. Considering the absence of any offer of proof with respect to the alleged materiality of anticipated testimony, or indeed any contradiction of the Government's suggestion (even if incorrect) that the testimony would be cumulative, a denial of a continuance was well within the Court's discretion. *Unger v. Sarafite*, 376 U.S. 575 (1963); *United States v. Wyler*, 487 F.2d 170, 174 (2d Cir. 1973).

Cardile also claims that the failure of the Court to grant the continuance somehow amounted to an abuse of discretion because of the 14 month pre-indictment delay and the brief 33-day interval between his arraignment and trial. This allegation is equally without substance since Cardile has not shown the remotest prejudice from the denial of his request.* The Court had previously granted

* On January 8, 1974, after both sides had rested, a hearing was held on the basis of which the court found that the pre-indictment delay was not prejudicial to the rights of the defendants (Tr. 494-503).

Cardile a continuance from December 24, 1973 to January 4, 1974. At trial, Cardile demonstrated an ability to pinpoint the surrounding circumstances of the crucial October 17, 1972 meeting with Parton by the use of his personal records. In addition, his admittedly vivid recall and the testimony of his two eye-witnesses indicate that he was not prejudiced by the prompt scheduling of the trial.

POINT II

Cardile's incriminating statements to Parton after their arraignment were properly admitted into evidence.

Cardile claims that certain incriminating statements which he made to Parton in the courthouse after their arraignment on the indictment were improperly received in evidence because the statements were made under circumstances which violated Cardile's right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964). The argument is frivolous.

First, no objection to the receipt of the testimony on this ground was made below and thus the point cannot be raised for the first time on appeal. *United States v. Purin*, 486 F.2d 1363, 1368 (2d Cir. 1973). Second, the conversation was initiated by Cardile himself who prevented his attorney, who was only a few feet away, from overhearing (Tr. 155). Thus, even if Parton were shown to have been a cooperating witness at that time, Cardile's volunteered and incriminating disclosures were in no way obtained in violation of his right to counsel, *United States v. Gaynor*, 472 F.2d 899, 900 (2d Cir. 1973).

POINT III**The Court did not improperly limit the receipt of defense testimony.**

Cardile complains that he and his wife were improperly precluded from testifying about the number of hours which they worked at their jobs. This testimony is alleged to have been necessary to rebut any inferences that their ownership of their home and two cars was the result of dealing in narcotics. The argument is utterly without merit.

An examination of the record reveals that Cardile testified as to the sources and amounts of both his and his wife's legitimate income (Tr. 351, 352); to the fact that he had a \$20,000 mortgage on his house (Tr. 353); and to the fact that his Cadillac was bought in used condition and on credit (Tr. 402, 403). His wife also testified as to her income (Tr. 459). This evidence adequately negated any possible inference concerning the source of the money to purchase the home and the cars. The Government never portrayed Cardile as a full-time narcotics dealer nor did it argue that these assets had been acquired with the proceeds of illegal transactions. The restrictions which were placed on defense testimony were exceptionally few (Tr. 352, 404, 459) and entirely proper.

POINT IV

Government's Exhibit 9 had been received in evidence and was properly examined by the jury during deliberations.

Frattini claims that Government's Exhibit No. 9 consisting in part of the analysis by the government chemist of the cocaine purchased by Driver and in part of the undercover agents' summary description of the source and subsequent custody of the cocaine was never received in evidence. He therefore claims its inspection by the jury during their deliberations amounted to reversible error. This claim is frivolous.

Exhibit 9 was in fact received in evidence (Tr. 253-254, 257). After the exhibit had been received, Frattini made an objection to its receipt without specifying any basis for the objection (Tr. 254). His present contention that portions of the report contained inadmissible hearsay is thus unavailing. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

Once in evidence (even if improperly so), allusions during summation to the report and its submission to the jury during deliberations were of course proper.

POINT V

In the absence of a defense request, there was no error in the Court's failure to hold a hearing into the ability of Juror No. 6 to understand English.

Frattini also claims that the Court's failure to hold an evidentiary hearing to determine whether one of the jurors adequately understood the English language was reversible error. He contends that since the trial judge apparently had notice of the juror's difficulty in following the proceedings, the Court was obligated, *sua sponte*, to hold a hearing. This contention is without merit.

On the first day of trial, the court volunteered the possibility that Juror No. 6 was encountering difficulty in following the proceedings because "he did not understand English very well." When the Court suggested to the lawyers that Juror No. 6 be replaced by an alternate, the Government responded that it had no objection. However, Cardile's counsel objected, and, if silence be any guide, he was apparently joined in that objection by Frattini (Tr. 95-96). Significantly, the Court's disclosure occurred on the first day of trial, thereby allowing both defense counsel the three remaining days of trial to review their position, or at least request the evidentiary hearing which Frattini now claims should have been held. No such request was made and defense counsel thereafter raised no objection to the juror's participation in the deliberations.

If ever there were a case where defense failure to object should categorically preclude a claim of error on appeal, this is such a case. Four alternate jurors were available to be substituted for Juror 6 had the defense requested either his disqualification or a hearing to probe the need for disqualification. Having failed to make any such request at a

time when any possible need for a new trial could have been obviated, Frattini is surely not entitled to a new trial now.

Finally, the jury's deliberations themselves gave no indication whatsoever that the juror in question had not adequately understood the trial testimony or was unable to participate in the process of reaching a verdict. *United States v. Dioguardi*, 492 F.2d 70, 78 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York
Attorney for the United States
of America.*

NICHOLAS FIGUEROA,
S. ANDREW SCHAFFER,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York }
County of New York }

NICHOLAS FIGUEROA being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *22* day of *MAY* 1974
he served a copy of the within *Brief*
by placing the same in a properly postpaid franked
envelope addressed:

PHILIP R. EDELBAUM
202 MANHATTAN AVE
WHITE PLAINS, N.Y. 10601

& GILBERT EPSTEIN
253 B'WAY
NY NY 10007

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Hector Lopez

Sworn to before me this

22 day of *May*, 1974

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975